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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNARD GERALD JOHNSON, Defendant and Appellant.	E045514 (Super.Ct.No. FWV035414) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, David Delgado-Rucci and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Kennard Gerald Johnson appeals his guilty plea on the grounds of ineffective assistance of counsel.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 28, 2005, defendant entered an automobile dealership, submitted a credit application, and signed a sales contract to purchase a used vehicle. To facilitate the sales contract, defendant wrote a fraudulent check in the amount of $4,000. He also included false information in the credit application.[2]

In a first amended information, defendant was charged with the following offenses: count 1, unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)); count 2, grand theft of a vehicle (Pen. Code, § 487, subd. (d)(1)); count 3, receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)); and count 4, forgery (Pen. Code, § 476). It was further alleged defendant had previously been convicted of one serious or violent felony (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and had served five prior prison terms (Pen. Code, § 667.5, subd. (b)).

Pursuant to a written plea agreement, defendant pled guilty to all four counts alleged in the first amended information and admitted all of the prior conviction allegations. The parties stipulated to the police report and the preliminary hearing

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[1] Defendant also filed a petition for writ of habeas corpus (case No. E046894), which raises a related ineffective assistance of counsel claim. He has therefore requested consolidation of the writ petition and the appeal. Defendant's request for consolidation is denied. We will resolve the petition for writ of habeas corpus by separate order.

[2] Because defendant's appeal follows a guilty plea, the relevant facts have been taken from testimony presented at the preliminary hearing.

transcript as the factual basis for the guilty plea. Defense counsel made no objection and indicated he concurred with his client's guilty plea and admissions.

Immediately following the guilty plea, the trial court sentenced defendant to a total of 14 years four months in state prison. To reach the total sentence of 14 years four months, the court imposed the upper term of four years on count 1 and doubled it to eight years as a result of the prior strike. The court imposed the upper term of four years each on counts 2 and 3 but stayed both pursuant to Penal Code section 654. On count 4, the court imposed eight months (i.e., one-third the middle term of two years), doubled to one year four months as a result of the prior strike, and ordered it to be served consecutively to the term imposed on count 1. The court then added one consecutive year for each of the five prior prison terms. As provided in the plea agreement, the court stayed the sentence and defendant was released on his own recognizance so he could be present for the birth of his child. Defendant's release was subject to various terms and conditions as set forth on the record and in the written plea agreement, as well as defendant's appearance in court on September 22, 2006. The court also indicated it would be willing to continue the matter if defendant appeared on September 22, 2006, with a doctor's statement indicating the child would be born on some later date. If he returned thereafter as ordered by the court, the plea agreement provided for the court to withdraw the previously imposed but stayed sentence of 14 years four months and to resentence defendant to a total of six years in state prison. If he failed to appear or violated the terms of his release, the trial court stated it would lift the stay on the previously imposed sentence of 14 years four months. The parties refer to this arrangement as a "*Vargas*

waiver" based on the approval of a similar plea agreement in *People v. Vargas* (1990) 223 Cal.App.3d 1107 (*Vargas*).

On September 22, 2006, defendant appeared in court as ordered. The court continued the matter to September 29, 2006, and defendant was once again released on his own recognizance subject to the same terms and conditions as his previous release. On September 29, 2006, defendant failed to appear and the court issued a bench warrant for his arrest. Defendant next appeared in the case while in custody more than one year later on October 3, 2007. While in custody awaiting final sentencing, defendant filed a motion to withdraw his plea, but the motion was denied.

On March 21, 2008, the court found defendant violated the terms of his *Vargas* waiver. As a result, the court lifted the stay and imposed the total sentence of 14 years four months in state prison. There was no objection to the manner in which the sentence was calculated at that time, or at the original sentencing.

DISCUSSION

Defendant contends his attorney was constitutionally ineffective for the following reasons: First, he concurred in the plea agreement and allowed defendant to plead guilty to unlawfully taking or driving a vehicle and grand theft of a vehicle even though California case law precludes a conviction for both offenses involving the same vehicle. (*People v. Kehoe* (1949) 33 Cal.2d 711, 713-716.) Second, he concurred in the plea agreement and allowed defendant to plead guilty to grand theft of a vehicle and receiving the same stolen vehicle when California case law precludes a conviction for theft of property and receiving the same property. (*People v. Recio* (2007) 156 Cal.App.4th 719,

726.) Third, he concurred in the plea agreement and allowed defendant to be sentenced for forgery and unlawfully taking or driving a vehicle even though Penal Code section 654 precludes punishment for both offenses because they are based on the same indivisible transaction. (*People v. Rosenberg* (1963) 212 Cal.App.2d 773, 777.) Fourth, he concurred in the plea agreement and allowed defendant to be sentenced to one additional consecutive year for each of five prior prison terms under Penal Code section 667.5 even though it should have been obvious based on his record that he could not have completed five separate prison terms.

Defendant argues reasonable, effective counsel would have objected to the plea and pointed out the illegality of the sentence provided in the agreement, so the court would not accept it. If counsel had objected and the court did not accept the agreement, defendant speculates he would have gone to trial, or the prosecution would have offered, and he would have accepted, a plea agreement that included only legal convictions and a lawful sentence. If he went to trial, defendant believes his sentencing exposure was between nine and 12 years.

Ordinarily, a defendant who pleads guilty in exchange for a specific sentence and receives the benefit of the bargain is estopped from later complaining about the sentence he received as a result of the plea agreement. In *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), the defendant pled guilty to several charges, including burglary and felony assault, in exchange for a four-year sentence. Defendant's counsel concurred in the plea agreement and made no objection at the time of sentencing. (*Id*. at p. 293.) On appeal, the defendant claimed the trial court erroneously failed to stay the sentence on the felony

assault count under Penal Code section 654, because the burglary and the assault were committed pursuant to a single intent and objective. (*Id.* at p. 294.)

Our Supreme Court in *Hester* found defendant was estopped from complaining about a sentence to which he agreed. "The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception: Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.] While failure to object is not an implicit waiver of . . . rights, acceptance of the plea bargain here was." (*Hester*, *supra*, 22 Cal.4th at p. 295.)

A cognizable claim of ineffective assistance of counsel requires a showing "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Id.* at p. 688.) Reasonableness is measured by "prevailing professional norms." (*Ibid*.) Counsel's performance must be viewed "under the circumstances as they stood at the time that counsel acted or failed to act. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

To prevail on an ineffective assistance of counsel claim, a defendant must also establish counsel's performance prejudiced his defense. (*Strickland*, *supra*, 466 U.S. at p. 687.) To establish prejudice, a defendant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) Because a defendant must prove both elements of the *Strickland* test in order to prevail, courts may reject an ineffective assistance of counsel claim if it finds counsel's performance was reasonable or the claimed error was not prejudicial. (*Id.* at p. 687.)

"[A] defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent." (*People v. Scott* (1994) 9 Cal.4th 331, 351.) However, courts determining whether counsel's performance was deficient must " 'exercise deferential scrutiny' " and "should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) "Because we accord great deference to trial counsel's tactical decisions, counsel's failure to object rarely provides a basis for finding incompetence of counsel." (*People v. Lewis* (2001) 25 Cal.4th 610, 661.) In addition, ineffective assistance of counsel claims must be rejected on direct appeal if the record does not affirmatively show why counsel failed to object and the circumstances suggest counsel could have had a valid tactical reason for not objecting. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In our view, the record reveals an obvious tactical purpose for counsel's failure to object to the 14-year four-month sentence provided in the plea agreement at the time defendant was sentenced. The record shows defendant rejected an offer on March 21, 2006, to plead guilty to count 1 in exchange for a four-year prison term plus the admission of one prison prior and the dismissal of a strike. Given defendant's exposure, this was an attractive offer. On May 30, 2006, defendant rejected a similar offer of "five years and a strike." Defendant rejected this offer even though he was advised on the record his maximum exposure was about 13 years.

After declining two attractive offers, at least one of which was less than his actual sentencing exposure, defendant entered into the plea agreement which included the risky *Vargas* waiver and a total sentence of 14 years four months if he failed to abide by the terms of his release. There is nothing to indicate defendant's attorney failed to advise him that the 14-year four-month sentence provided in the plea agreement, which was obviously calculated to make certain he complied with the terms of release under a *Vargas* waiver, exceeded the sentence the trial court was likely to impose if he went to trial on all of the allegations against him. These circumstances show that defendant desired a release under a *Vargas* waiver so he could be present for the birth of his child and this was the primary motive for declining the prior offers and for entering into the challenged plea agreement.

In addition to defendant's temporary release under a *Vargas* waiver, the plea agreement included another substantial benefit to defendant if he abided by the terms of his release—a six-year term that was significantly less than the term he was likely to

receive if he was convicted on all viable charges and allegations at trial. Because of this potential for a favorable sentence, and defendant's strong desire for a plea agreement allowing his release under a *Vargas* waiver, it would not have been in defendant's best interest for his attorney to object to the terms of the plea bargain and risk the trial court's rejection of the agreement. Some defense attorneys would not have concurred in the plea agreement and would have objected to the 14-year four-month sentence. However, based on the record alone and under the particular circumstances presented, we cannot conclude counsel's failure to object fell below prevailing professional norms.[3] Because we cannot conclude on the record before us that counsel's performance was deficient, we must reject defendant's ineffective assistance of counsel claim.

[3] At oral argument, the People indicated another possible reason for counsel's failure to object: the total sentence of 14 years four months was not outside the realm of possibility if there had been further development of the factual record. This is because Vehicle Code section 10851, subdivision (a), proscribes two separate and distinct crimes. First, it prohibits the act of taking a vehicle without the owner's consent with the intent to steal it. Second, it prohibits the act of driving a vehicle without the consent of the owner with or without the intent to steal. This second "non-theft" component of Vehicle Code section 10851, subdivision (a), is said to proscribe two types of conduct—either posttheft driving of the vehicle once the theft is complete, or "joyriding," which is driving the vehicle with the intent only to temporarily deprive the owner of possession. (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Although these facts were not elicited at the preliminary hearing, the People represented that defendant appeared at the parole office about 30 days after the initial vehicle theft offense was complete. At the time, defendant allegedly had the keys to the vehicle in his possession, suggesting he could also have been charged with another separate and divisible count of Vehicle Code section 10851, subdivision (a), for posttheft driving of the vehicle.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.